STATE OF INDIANA

INDIANAPOLIS 46204

INDIANA UTILITY REGULATORY COMMISSION
302 W WASHINGTON STREET ROOM E306

September 24, 1998

Hon. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554

Re: Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147

Dear Secretary Salas:

The Indiana Utility Regulatory Commission and the Staff of the Public Service Commission of Wisconsin jointly file the enclosed comments in response to the August 7, 1998 Memorandum and Proposed Order, and Notice of Proposed Rulemaking, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-147.

Included in this filing are an original and five copies. Please stamp one copy "received" and return it to the Indiana Utility Regulatory Commission in the self-addressed, stamped envelope that is enclosed.

The contact information for the IURC and the PSCW are as follows:

Sandy Ibaugh, Director
Telecommunications Division
Indiana Utility Regulatory Commission
302 W. Washington Street, Rm E306
Indianapolis, IN 46204
FAX: 317/233-1981

Scot Cullen, Administrator
Telecommunications Division
Public Service Commission of Wisconsin
P.O. Box 7854
Madison, WI 53707-7854
FAX: 608-266-3957

Please contact Maureen Flood, senior telecommunications analyst, at 317/232-2785 if there are any problems with this filing.

Cordially,

Sandy Ibaugh /kh

Sandy Ibaugh
Director of Telecommunications

Enclosures

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List A B C D E

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
	)	
Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology	)	CC Docket No. 98-32
	)	
Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	)	CCB/CPD No. 98-15 RM 9244
	)	
Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	)	CC Docket No. 98-78
	)	
Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service	)	CC Docket No. 98-91

COMMENTS OF INDIANA UTILITY REGULATORY COMMISSION (IURC) AND THE TECHNICAL STAFF OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN (PSCW)[1]

I. Summary

In these comments, the Indiana Utility Regulatory Commission (IURC) and the technical staff of the Public Service Commission of Wisconsin (Staff of the PSCW) outline several negative public policy outcomes that could result if the FCC adopts the regulatory regime outlined in its Memorandum Opinion and Order, and Notice of Proposed Rulemaking (NPRM), in CC Docket No.

[1] On September 24, 1998, the PSCW authorized the staff of its Telecommunications Division to provide its analysis to the FCC regarding the matters addressed in the NPRM. It would not be appropriate for the PSCW to file comments because of the pendancy before the PSCW of multiple dockets relating to the issues which are the subject of this FCC NPRM. Among those dockets are

Petition of Ameritech Advanced Data Services of Wisconsin, Inc. for Authorization to Resell Frame Relay Switched Multimegabit Data, and Asynchronous Transfer Mode Services on an Intrastate Basis and to Operate as an Alternative Telecommunications Utility in Wisconsin	7825-TI-100
and	
Investigation into the Digital Services and Facilities of Wisconsin Bell, Inc. (d/b/a Ameritech Wisconsin)	6720-TI-154

The PSCW's policies regarding these matters will be decided in these dockets.

98-147, Deployment of Wireline Services Offering Advanced Telecommunications Capability. Our concerns are listed below:

- Indiana's experience with the relationship between Ameritech Indiana, an incumbent local exchange carrier (ILEC), and Ameritech Advanced Data Services of Indiana, its advanced services affiliate, concerns us because the rules in the NPRM may not prevent the two carriers from collaborating to stifle competition.
- The FCC's rejection of Ameritech Michigan's 271 petition raises concerns about Ameritech's compliance with requirements for structural separation of its LECs and affiliates. These concerns equally apply to structural separation of RBOC LECs and advanced services affiliates.
- If Regional Bell Operating Companies (RBOCs) are permitted to offer advanced telecommunications services through an affiliate that is not subject to ILEC regulation, there may be disinvestment in the public switched network. As a result, service quality for "plain old telephone service" customers may decline while rates for poorer quality service might increase because of a shrinking rate base.
- According to the NPRM, advanced services affiliates will not be subject to section 251(c) of the Telecommunications Act of 1996, so the FCC and the states will lose their ability to regulate the prices at which affiliates offer services and network elements to other carriers. As a result, federal and state regulators will lose their ability to enforce the "just, reasonable and affordable" standard of section 254(b)(1) and the "reasonably comparable" standard of section 254(b)(3) of the Telecommunications Act of 1996 as they apply to the "retail" advanced telecommunications services offered by those other carriers and which utilize the services and network elements of the RBOC advanced services affiliate as inputs.
- Interconnection requirements (as outlined in sections 251(a) and 251(b) of the Telecommunications Act of 1996), which are the only interconnection requirements faced by an advanced services affiliate according to the NPRM, may not ensure ubiquitous network interconnectivity because of economic and structural barriers.
- RBOC affiliates already may have a competitive advantage in the provision of advanced telecommunications services, which may in turn serve as a disincentive for competitive carriers to enter this market.
- The regulatory regime proposed in the NPRM could serve as a de facto preemption of state authority to recover the cost of the local loop, 75 percent of which is under the jurisdiction of state commissions. It also may preempt states efforts, such as those of Wisconsin, to require advanced services capability to all state residents.

Both the IURC and the Staff of the PSCW recommend that the FCC proceed with its Notice of Inquiry regarding the deployment of advanced telecommunications services. Only after the FCC and state commissions are fully informed about the scope of deployment should a rulemaking that promotes additional deployment be undertaken. However, if the FCC decides to proceed with the implementation of the rules contained in the NPRM, the IURC and Staff of the PSCW request that the FCC also undertake a comprehensive rulemaking regarding when and how section 251(h)(2) of the Telecommunications Act of 1996 should be implemented. Developing standards for when an affiliate should be treated as an incumbent local exchange carrier in a market will prevent many of the negative public policy outcomes described above from occurring.

II. Introduction

These comments are filed in response to the Memorandum Opinion and Order, and Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding, released on August 7, 1998. The FCC therein has proposed actions intended to encourage all wireline providers, both incumbent local exchange companies (ILECs) and their competitors, to provide advanced telecommunications services. The NPRM offers an incumbent local telephone company the option to provide advanced services through an affiliate on a largely deregulated basis while strengthening competitors' access to the unbundled elements of the ILEC's network and its central office collocation space.

The FCC concluded that it did not have the statutory authority to forbear from the market-opening requirements placed on incumbents in sections 251 and 271 of the Telecommunications Act of 1996 (the Act) until those requirements have been fully implemented. The FCC also denied the Regional Bell Operating Companies' (RBOC) petitions to establish a single, global LATA, which would allow them to offer long distance data services prior to the full implementation of sections 251 and 271.

The FCC went on to opine that, under the Communications Act of 1934 (Communications Act), an incumbent local telephone company may avoid the ILEC responsibilities if it is willing to offer advanced services through a "truly separate" subsidiary. Under designated circumstances a separate affiliate would not be deemed an ILEC, as that term is defined in the Act, and therefore would not be subject to the same requirements as the ILEC. The FCC proposed specific safeguards that would apply to such an affiliate.

The FCC initiated the rulemaking in response to the request by the Association for Local Telecommunications Services (ALTS), representing competitive local exchange carrier (CLEC) interests, to strengthen collocation requirements and reduce the costs and delays associated with collocation. The FCC has also asked for comment on whether it should review and revise its rules regarding the provision of loops to CLECs. The FCC believes that the requirement that the incumbent treat all competitors in the same manner as its affiliate should give the incumbent the incentive to improve its processes and provide unbundled elements and collocation space as quickly and cheaply as possible to all competitors.

The Order addresses issues raised in petitions filed by several RBOCs and ALTS. The RBOCs requested relief from certain of the Communications Act's requirements that are generally applicable to incumbents' provision of telecommunications, including the unbundling requirement which compels incumbents to make their network elements available for use by competitors at rates which are consistent with the requirements at 47 U.S.C. 252(d)(1). The RBOCs assert that requiring them to make their advanced telecommunications facilities and technologies available to their competitors discourages them from investing in advanced telecommunications facilities in the first place. At the same time, ALTS asked the FCC to declare that the Act applies equally to voice and data networks.

The FCC concluded that Congress made clear that the Communications Act is technologically neutral and is designed to ensure competition in all telecommunications markets. As a result, the FCC determined that:

- an ILEC must interconnect its data network with the data networks of competitors;

- the facilities and equipment used by an incumbent to provide advanced services are network elements and subject to the Act's unbundling obligations; and
- the Act obligates an incumbent local telephone company to offer for resale, at a discount, all advanced services provided to retail customers

In comments filed in April 1998 in response to the RBOC and Alliance for Public Technology (APT) petitions, the PSCW and the IURC cautioned "that § 706 calls for the FCC to first issue a Notice of Inquiry (NOI), not a Notice of Proposed Rulemaking (NPRM), and none of the petitions raise concerns of such urgency or gravity that the statutory directive should be circumvented." Now that the FCC has both the NOI and the NPRM, the Staff of the PSCW and IURC reiterate the importance of the regulatory decisions before the FCC. We continue to believe that the RBOCs' perceived urgency should be tempered with the need for strategic regulatory policy that will stand the test of time. Such policy is not reached in hasty action, but rather in thorough, comprehensive analysis. We raise many unresolved matters and concerns regarding the approach the FCC is proposing for LEC separate subsidiaries that offer advanced telecommunications services. These matters and concerns are not limited to concerns over jurisdiction; they also address the consequences for competition and universal service.

III. Section 706 Envisions a Joint State and Federal Responsibility

InterLATA advanced telecommunications services consist of both interstate and intrastate services. In a rulemaking under section 706, the FCC should take note of each state commission's actions to encourage infrastructure investment under the Act and actions to address the same issues raised in the petitions. The FCC should take action, under section 706, to accelerate deployment of advanced telecommunications capability only if after an investigation it finds that such capability is not being deployed to all Americans in a reasonable and timely fashion despite its and the States' efforts to promote its deployment under the Act and State law.

The Staff of the PSCW and IURC believe the Act calls for, and the Staff of the PSCW and IURC look forward to, State/Federal cooperation in the effort to achieve the goals of the 1996 Act for advanced telecommunications capabilities. This is in contrast to the remedies put forth in the section 706 petitions, which envision little or no role for either the FCC or the states in overseeing the deployment of advanced services. The FCC appropriately denied these petitions. Further, the Staff of the PSCW and IURC posit that section 706 also requires the consideration of all of the goals of the Act, and not just those pertaining to advanced services, when it mandates that any grant of regulatory relief by the FCC to those providers investing in "advanced telecommunications capability" done "in a manner consistent with the public interest, convenience and necessity." The NPRM raises possible preemption and jurisdictional issues where state policies may already suffice. It also creates potential conflicts with other sections of the Act.

The PSCW has investigated the relationship between advanced service offerings and essential services in its Universal Service rulemaking and in its docket regarding a petition for authority to provide advanced services filed in 1993 by Ameritech Advanced Data Services of Wisconsin, Inc. (AADS-WI). Although the other four Ameritech states authorized AADS,[2] the PSCW denied the

[2] The IURC takes no position regarding AADS-WI as it already has granted AADS of Indiana, Inc., a Certificate of Territorial Authority.

petition.[3] In addition, for more than two years, the PSCW has had administrative rules for universal service that address the statewide rollout of advanced services. Those rules are currently subject to revision under a statutorily required review. With regard to essential or basic services, the proper transition point between increasing the data transmission rates over analog circuits to the roll-out of loop-based advanced services (digital access lines) is the subject of considerable debate in the rule development.

IV. Concerns Regarding the Relationship between Ameritech Indiana and Ameritech Advanced Data Services of Indiana, Inc.

The FCC has asked states to address specific concerns about the relationship between RBOCs and their advanced services affiliates.[4] Based upon an analysis of the relationship in Indiana, the IURC is concerned that the rules included in the FCC's NPRM could provide affiliates of RBOCs with monopoly power in emerging markets for advanced services.

The IURC granted Ameritech Advanced Data Services of Indiana, Inc. (AADS-IN) a Certificate of Territorial Authority to provide frame relay service, switched multi-megabit data service and asynchronous transfer mode service within the state of Indiana on September 29, 1993, prior to the passage of the Telecommunications Act of 1996 (the Act).[5] AADS-IN is a "separate entity" from Ameritech Indiana that was formed to provide advanced technologies in Indiana, primarily to large businesses. According to AADS-IN testimony, as cited in the order,

> AADS will not share space with any ILEC central office, it will maintain its own books, accounts, employees and office locations, and in offering services, it will primarily contract with independent third party distributors whose expertise and experience is chiefly in the field of data/information transmission. As a result, AADS will transact its business using a strategy and organization different from that of the traditional LEC.[6]

Citing competition in the market for data services and the fact that functionally similar services were being offered by unregulated or partially regulated providers, the IURC found that its regulatory jurisdiction over AADS-IN should be limited to the same extent that it exercises jurisdiction over resellers.[7] AADS-IN, therefore, files an informational tariff with the IURC setting forth a description of the telecommunications services it offers. However, such tariff does not include a schedule of rates and charges for AADS-IN's services.

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[3] The PSCW's denial of AADS-WI's petition was reversed by the Court of Appeals of Wisconsin and is on remand to the PSCW. See note 1.

[4] NPRM page 42 at paragraph 88: "We recognize that many states have significant practical experience in dealing with LEC affiliates in a variety of contexts. We therefore welcome input from the states on each of the issues raised below regarding provision of advanced services through a separate affiliate."

[5] *In the Matter of the Petition Ameritech Advanced Data Services of Indiana, Inc. for a Certificate of Territorial Authority and Requesting the FCC to Decline the Exercise of its Jurisdiction Pursuant to I.C. 8-1-2.6;* Cause No. 39718, September 29, 1993.

[6] Id page 2.

[7] Id page 3.

The FCC's proposal to allow an RBOC to offer advanced telecommunications services through an affiliate that is not classified as an ILEC (and, hence, is not subject to those statutes and regulations which affect only ILECs—e.g., 47 U.S.C. 251(c))— concerns the IURC, because of the complexity of the relationship between AADS-IN and Ameritech Indiana. In March 1997, Intermedia Communications, Inc. (ICI) petitioned the IURC to arbitrate an interconnection agreement for frame relay service between ICI and Ameritech Indiana.[8] In its responses to an ICI information request, Ameritech Indiana described the ILEC/affiliate relationship as follows: Ameritech Indiana stated that AADS-IN owns frame relay switches. Ameritech Indiana then purchases switching service from AADS-IN, which is combined with Ameritech Indiana's distribution plant to create frame relay service. AADS-IN in turn purchases frame relay service pursuant to tariff from Ameritech Indiana, which AADS-IN then resells to end users. The switches owned by AADS-IN are not collocated in Ameritech Indiana central offices, but instead are housed in non-Ameritech Indiana facilities.[9]

The IURC believes that this type of byzantine relationship may slow the deployment of all advanced telecommunications services. The IURC has declined jurisdiction over AADS-IN, and the FCC proposes in its NPRM to waive the requirements of section 251(c) of the Act for advanced services affiliates. Although AADS-IN will have to interconnect with other carriers pursuant to section 251(a) as well as provide its service for resale pursuant to section 251(b), the FCC and the states will not have the authority to regulate the prices that an advanced services affiliate charges to these other carriers because the affiliate is not subject to the requirements of 251(c) under the FCC's proposed rules.

For example, if AADS-IN should decide to provide switching services or elements to either Ameritech Indiana or non-affiliated carriers, the IURC has no authority to regulate the price at which this switching is offered. If AADS-IN charges Ameritech Indiana an exceptionally high rate for use of a switch, this price will not harm Ameritech Indiana or Ameritech Corporation (although it could have an adverse impact upon Ameritech Indiana customers who are charged the rate). Under this scenario, the "extremely high rate" could actually benefit Ameritech Corporation; the recovery from Ameritech Indiana customers would simply represent a transfer of monies within the larger Ameritech holding company.[10] In contrast, the AADS-IN rate might not be affordable to new entrants in the data services market, and therefore may serve as a barrier to carriers who plan to provide service by interconnecting their distribution plant with an AADS-IN switch.[11] It may be necessary for the unaffiliated new entrant to resell Ameritech Indiana's service. Alternately, AADS-IN could provide switching to Ameritech Indiana at a lower rate than it offers the same service to

[8] *In the Matter of the Petition by Intermedia Communications, Inc. for Arbitration with Ameritech Indiana Pursuant to the Telecommunications Act of 1996;* Docket No. 40787-INT-01, March 11, 1997.

[9] *In the Matter of the Petition by Intermedia Communications, Inc. for Arbitration with Ameritech Indiana Pursuant to the Telecommunications Act of 1996: Ameritech Indiana's Responses to Information Requests of Intermedia Communications, Inc.*; Cause No. 40787-INT-01, May 7, 1997.

[10] If Ameritech Indiana charged its customers an amount less than what it paid its affiliate (AADS-IN) for a given unit of switching, then, all other things being equal, the difference would be capitalized or shifted to either Ameritech's shareholders, its employees, or to other Ameritech Indiana customers in the form of subsidies or contributions.

[11] As with Ameritech Indiana, if an unaffiliated data provider charged its customers an amount less than what it paid to AADS-IN for a given unit of switching, then the difference would be shifted to either the unaffiliated provider's shareholders, to its employees, or to other customers of the unaffiliated provider in the form of subsidies or contributions.

competitors because AADS is not subject to the interconnection requirements of section 251(c) of the Act, which are applicable only to ILECs.[12]

This relationship also allows Ameritech Indiana, in conjunction with AADS-IN, to deploy an inefficient network. Ameritech Indiana has deployed trunks to interconnect its distribution plant with switches owned by AADS-IN. If the switches were located in Ameritech Indiana central offices, it would not be necessary to deploy trunks to connect the AADS-IN switches with Ameritech Indiana's distribution plant. In rebuttal testimony submitted by ICI during its arbitration proceeding with Ameritech Indiana, ICI argued that these trunks should not be included in the cost of interconnection because they represent a business decision by Ameritech, not an efficient use of network resources.[13]

The IURC realizes that the FCC primarily is concerned about the deployment of broadband technology that utilizes investment in the existing copper loop, specifically xDSL technology. However, such operating structure, as described above, highlights a major shortcoming of the separate affiliate model: how can the FCC and the states ensure ubiquitous deployment of broadband technology when the ILEC shifts an essential component of its network to a non-regulated affiliate? The majority of the safeguards that the FCC has outlined in the NPRM, including the seven criteria for regulation as a non-incumbent LEC, are geared at preventing discrimination in the provision of advanced telecommunications services by the incumbent LEC to its affiliate, not from the affiliate to the incumbent LEC.[14]

This example is similar to the hypothetical "price squeeze" engineered by an incumbent LEC, its affiliated advanced services provider, and its affiliated information services provider (ISP) on an independent ISP that the FCC outlines in the NPRM.[15] The IURC and the Staff of the PSCW believe that there are many opportunities for the incumbent LEC and the advanced services affiliate to work in concert to stifle competition and maximize profits.

One way to prevent anti-competitive arrangements between an ILEC and its affiliated advanced services provider is to require that a contract between the two parties is a public document. The IURC and the Staff of the PSCW agree with the seven standards set forth in the NPRM, which an advanced services affiliate must fulfill in order to achieve regulatory status as a non-incumbent LEC.[16] We emphasize that the seventh criterion, "an advanced services affiliate must interconnect

[12] See IURC Cause No. 39718: In a stipulated agreement between AADS-IN, AT&T, MCI and the OUCC, Indiana Bell Telephone Company (d/b/a Ameritech Indiana) must provide written notice of any services or service components made available to AADS-IN on a non-tariffed basis. However, there is no requirement that AADS-IN provide written notice if it transfers services or service components to Indiana Bell Telephone Company.

[13] Rebuttal Testimony of Michael Viren on behalf of Intermedia Communications, Inc., May 13, 1997.

[14] NPRM page 11 at paragraph 10.

[15] NPRM page 49 at paragraph 102.

[16] NPRM page 11 at paragraph 10: 1) the incumbent must "operate independently" from its affiliate; 2) transactions must be on an arm's length basis, reduced to writing, and made available for public inspection; 3) the incumbent and affiliate must maintain separate books, records, and accounts; 4) the incumbent and advanced services affiliate must have separate officers, directors, and employees; 5) the affiliate must not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the incumbent; 6) the incumbent LEC, in dealing with its advanced services affiliate may not discriminate in favor of its affiliate in the provision of any goods, services, facilities or information or in the establishment of standards; and 7) an advanced services affiliate must interconnect with the incumbent LEC pursuant to tariff or pursuant to an interconnection agreement, and

with the incumbent LEC pursuant to tariff or pursuant to an interconnection agreement, and whatever network elements, facilities, interfaces, information and systems are provided by the incumbent LEC to the affiliate must also be made available to unaffiliated carriers," should mandate that interconnection agreements are to be public documents which are available for review by any interested party. The requirements at 47 U.S.C. 252(h) may provide some guidance regarding the procedures to be followed in making the interconnection agreements available to the public. This requirement should apply whether the incumbent LEC is selling a service or network element to the advanced services affiliate, or vice versa. As a result, other carriers will be capable of negotiating similar agreements on their own behalf, and avoid discrimination by either the ILEC or its affiliate. Such requirements, however, would not remedy the "extremely high rate" scenario.

V. FCC's Order Rejecting Ameritech Michigan's 271 Application Raises Concerns about an RBOC's Compliance with Separate Subsidiary Requirements

On August 19, 1997, the FCC rejected Ameritech Michigan's petition to provide in-region, interLATA services within the state of Michigan, pursuant to section 271 of the Telecommunications Act of 1934.[17] In its order, the FCC addressed Ameritech Michigan's noncompliance with section 272 of the Act, specifically sections 272(b)(3) and 272(b)(5).

Section 272(b)(3) states that an affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." Though section 272 applies to an RBOC's provision of interLATA services through an affiliate, the language is the same as the FCC's fourth criterion for advanced services affiliates in the NPRM.[18]

The IURC and Staff of the PSCW remind the FCC that in its order addressing Ameritech Michigan's 271 application, the FCC found that Ameritech Michigan was not in compliance with section 272(b)(3) because it and Ameritech Communications, Inc. (ACI), Ameritech's in-region interLATA affiliate, did not have separate boards of directors. Specifically, neither Ameritech Michigan nor ACI had a board of directors; instead, both companies were owned completely by Ameritech Corporation, the parent company, and neither company's certificate of incorporation provided for a board of directors. The FCC found that this relationship clearly violated section 272(b)(3) of the Act:

> We conclude that Ameritech's corporate structure is not in compliance with the section 272(b)(3) requirements that its interLATA affiliate (ACI) maintain "separate" directors from the operating company (Ameritech Michigan). In particular, we find that under Delaware and Michigan corporate law, Ameritech Corporation has the duties, responsibilities, and liabilities of a director for both ACI and Ameritech

whatever network elements, facilities, interfaces and systems are provided by the incumbent LEC to the affiliate must also be made available to unaffiliated carriers.

[17] *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, FCC 97-298 (CC Docket No. 97-137), August 19, 1997.

[18] NPRM page 11 at paragraph 10

> Michigan. As a result, ACI lacks the independent management that Congress clearly intended in enacting the separate director requirement.[19]

The IURC and Staff of the PSCW encourage the FCC to undertake a similar investigation into RBOC corporate operating structures. Although the relationship described above is between an RBOC LEC and its interLATA affiliate, we believe it is possible that the same type of relationship may exist between RBOCs and their advanced services affiliates.

Section 272(b)(5) of the Act states that a separate affiliate "shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." As with the other requirements of section 272, this applies to an RBOC's interLATA affiliate. However, the FCC includes this same requirement for advanced services affiliates in the NPRM.[20]

In its order regarding Ameritech Michigan's 271 application, the FCC also found that Ameritech Michigan was not in compliance with section 272(b)(5). Specifically, the FCC found that Ameritech was not in compliance with the Act because written notice of transactions between Ameritech Michigan, the LEC, and ACI, the affiliate, did not include rates.

> ...We conclude that Ameritech has failed to demonstrate that it will carry out the requested authorization in accordance with section 272(b)(5), because it has failed to disclose publicly the rates for all of the transactions between Ameritech and ACI. Moreover, it appears that Ameritech and ACI have not disclosed publicly all of their transactions required by section 272(b)(5). Accordingly, if Ameritech continues its present behavior, and does not remedy these problems, it would not be in compliance with the requirements of section 272(b)(5).[21]

The case outlined above, though it applies to the relationship between an Ameritech LEC and an interLATA affiliate, reinforces the concerns expressed by the IURC and the Staff of the PSCW in the previous section. If the contracts filed with the states are not public and/or do not include the terms, conditions, and rates at which network elements and services are transferred from the LEC to the advanced services affiliate (or vice versa), then the RBOC faces few obstacles to enacting price squeezes and other types of anti-competitive strategies.

In summary, the IURC and Staff of the PSCW believe that the Commission's analysis of Ameritech Michigan's 271 application brought to light several serious concerns about the relationship between an RBOC and its affiliate. It is possible that the same type of relationship exists between RBOC LECs and advanced services affiliates in other states. We trust the FCC would undertake a similar

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[19] *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, FCC 97-298 (CC Docket No. 97-137), August 19, 1997; page 176 at paragraph 353.

[20] NPRM page 11 at paragraph 10.

[21] *In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, FCC 97-298 (CC Docket No. 97-137), August 19, 1997; page 182 at paragraph 367.

analysis before granting any RBOC advanced services affiliate non-incumbent LEC status as part of this rulemaking.

VI. Investment in Advanced Telecommunications Services Offered Through Separate Affiliates Could Lead to Disinvestment in the Public Switched Network

Both the IURC and the Staff of the PSCW are concerned that the ability of RBOCs to form new, unregulated affiliates through which they can provide advanced telecommunications services will lead to disinvestment in the public switched network. The FCC recognizes this concern in the NPRM.[22]

The IURC and the Staff of the PSCW believe that the regulatory regime proposed by the FCC in its NPRM provides RBOCs with an incentive to shift their most lucrative customers to packet-switched networks provided by an advanced services affiliate. The packet-switched network can carry voice, data, and video faster and cheaper than the existing public switched network. As stated below, an RBOC's advanced services affiliate has little incentive to serve rural, insular, high-cost and low-income customers, the ratepayers who are protected under Section 254(b)(3) of the Act.

Such transfer of customers from the RBOC local exchange carrier to the advanced services affiliate could have a negative impact on public policy, including universal service funding. Data networks may be engineered to target areas with large, high-volume business users. Many residential and/or high-cost subscribers might be left on the public switched network, which could receive little additional investment if the RBOCs do not make the business decision to serve these customers. Not only might quality of service remain stagnant, or even decline, but the number of customers paying for these services may decrease as well. In the end, fewer subscribers may be paying more for poorer quality service.

Investment by an affiliate in packet-switching capability can have other serious implications for the public switched network. Currently, Signaling System 7 (SS7) is essential to most companies' provision of local exchange telephone service and is an adjunct packet-switched network. SS7 is the means for setting up and terminating calls, transferring call details, averting network congestion, engaging proper audio transmissions and engaging certain custom calling features, all in a smooth and seamless manner. If packet-switching elements are under the control of the advanced services affiliate, not the local exchange carrier, the basic signaling functions of the public switched network will be controlled by a non-regulated affiliate. The affiliate can charge any price for Signaling System 7 because under the FCC's proposed regulatory regime, the affiliate is not subject to section 251(c) of the Act and, hence, is not subject to section 252(d). As a result, the FCC and the states would lose much of their ability to regulate prices.[23]

[22] NPRM page 53 at paragraph 117: "In addition, we note that some states have expressed concerns about an incumbent LEC's incentive to continue to innovate and invest in the public switched network. We are sensitive to these concerns, and we seek comment on how we and the states can work together to ensure that the incumbent LECs who choose to offer advanced services through affiliates do not allow their existing incumbent LEC networks to degrade."

[23] ILECs' SS7 rates, terms, and conditions generally appear in the interstate access tariffs of those carriers. The ILECs' data affiliates are not subject to Part 69; thus, similar concerns about the lack of regulatory oversight and/or enforcement capabilities are relevant, especially for those States which mirror interstate carrier access charges, such as Indiana.

VII. Attainment of Universal Service Goals Could Be Stalled if RBOCs Are Allowed to Offer Broadband Services through Separate Affiliates

Section 706 of the Act calls for the FCC to undertake an investigation regarding the deployment of advanced telecommunications capability to all Americans. If the investigation finds that such capability is not being deployed to all Americans in a reasonable and timely fashion despite the efforts by the FCC and the states, then the FCC is required to take action.[24] Section 706 allows the FCC to utilize regulatory forbearance, measures to promote local competition, or the removal of barriers to entry.[25]

Deployment of advanced telecommunications services also is addressed in section 254 of the Act. When outlining its goals for universal service, Congress clearly stated in section 254 that advanced telecommunications services should be ubiquitously deployed to all Americans at affordable rates. Specifically:

> SEC. 254(b)(1). QUALITY AND RATES- Quality services should be available at just, reasonable, and affordable rates.
>
> SEC. 254(b)(2) ACCESS TO ADVANCED SERVICES- Access to **advanced telecommunications and information services** should be provided in all regions of the Nation. (Emphasis added)
>
> SEC. 254(b)(3) ACCESS IN RURAL AND HIGH COST AREAS- Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and **advanced telecommunications and information services**, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas. (Emphasis added)

The Staff of the PSCW and the IURC are concerned that the regulatory regime proposed by the FCC in its NPRM may stifle the ubiquitous deployment of advanced telecommunications and information services at "just, reasonable, and affordable rates" for several reasons.

An RBOC affiliate has an incentive to offer advanced data, telecommunications, and/or information services to business users and customers located in urban areas, since these are the most lucrative subscribers. The RBOC affiliate has little profit incentive and little or no federal regulatory mandate to offer broadband capability to <u>all</u> Americans; the FCC's proposed rules would make it difficult for the states to impose a similar mandate for intrastate services and customers, as well, should they determine that to be appropriate. Instead, the RBOC affiliate has the ability to "cherry-pick" the most lucrative subscribers. Residential customers, as well as customers who live in rural, insular, and high-cost areas, most likely will not have access to these advanced capabilities as quickly as business and urban customers, if at all.

[24] Telecommunications Act of 1996 at Section 706(b).
[25] Id.

As previously stated, the FCC proposes to decline jurisdiction over the rates, charges, terms and conditions at which the RBOC affiliate offers broadband capability because the affiliate is not subject to section 251(c) of the Act. Depending upon the applicable intrastate regulatory framework in place, an advanced services affiliate may have a great deal of flexibility in setting rates for the services and/or elements under its control, which in turn might be purchased by an affiliated LEC, a non-affiliated LEC, or an information services provider. The rate which the advanced services affiliate charges is an input (cost) to the rates which an affiliated LEC, a non-affiliated LEC, or an information services provider charges its own (retail) customers for advanced services. A non-regulated rate charged by an advanced services affiliate could influence rates charged by regulated carriers to end-users. As a result, the FCC and states each lose their authority to enforce the "affordable" and "reasonably comparable" standards in sections 254(b)(1) and 254(b)(3), respectively. Any rate for an advanced service that is above an affordability and/or a comparability benchmark may require subsidization from a universal service fund or a high cost fund to bring it down to a reasonable level. The rules proposed by the FCC effectively preempt the states from establishing rates for advanced telecommunications, information, and/or data services that recover a "retail" carrier's cost of providing these services, while still maximizing the number of customers who subscribe to the service by maintaining an affordability standard. In those situations in which the retail carrier purchased services or elements from the RBOC, this cost to the retail carrier would be largely dependent on the rate(s) which the RBOC affiliate charged that carrier.

Advanced telecommunications and information services currently are not included in the definition of services that are eligible for Federal Universal Service Fund support.[26] As such, they are not eligible for federal universal service funding. If advanced services were added to the definition of services eligible for support pursuant to Section 254(c)(2) of the Act, Eligible Telecommunications Carriers (ETCs) would be required to ubiquitously offer these services in their territory in order to recover support from the Federal Universal Service Fund. ETCs also would be able to recover the cost of providing broadband service to high-cost customers. Most importantly, state commissions could exercise whatever authority they have to regulate rates for these services, thereby making it easier to enforce the "just, reasonable, and affordable" standards of sections 254(i) and 254(b)(1), and the "reasonably comparable" standard of section 254(b)(3).

The IURC and Staff of the PSCW believe that Congress formulated the universal service objectives contained in section 254 because it knew that the market alone would not ensure the same quality and quantity of telecommunications services for all Americans. The FCC's reliance on a market-based approach to accelerate deployment of broadband services, pursuant to section 706, appears to supercede the universal service objectives contained in section 254. Both the IURC and the Staff of the PSCW view section 706 as a last resort to be utilized if section 254 fails. Since the FCC has not yet exercised its jurisdiction over advanced services under section 254, the FCC's proposed rules may be premature. We believe that section 706 should be applied after advanced services are considered in relation to the definition of universal service, and only if the scope of deployment is unsatisfactory to the FCC and the States based on the results of the section 706 Notice of Inquiry and any additional federal or state analyses.

[26] *In the Matter of Federal-State Joint Board on Universal Service*, at Para. 56, *et seq.*; CC Docket 96-45, FCC 97-157; May 7, 1997.

VIII. Interconnection Requirements for Separate Subsidiaries Are Not Adequate to Assure the Public Utility Model for Advanced Services

The FCC indicates in paragraph 37 of the NPRM that it seeks comment on whether or not to apply additional unbundling requirements if an RBOC advanced services affiliate offers its services in conjunction with an RBOC information service. We believe that such additional protections are necessary to achieve the widespread availability envisioned by the public utility model for interconnection of data services. High-speed Internet access alone is too limited an objective for advanced services under section 706 of the Act. A network of networks offering high-speed data interconnectivity over the public switched network (whether packet switched or circuit switched) should be the objective.

While the NPRM would impose the requirements of sections 251(a) and 251(b) on RBOC advanced services affiliates, the interconnection required therein is "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers . . ." This requirement is not likely to be met in a manner that assures ubiquitous network connectivity due to economic and structural barriers inherent in this model. It would appear that by default there would be a heavy reliance on the Internet for telecommunications connectivity. Yet, the Internet is not a secure or reliable venue for telecommunications service.

For example, suppose an RBOC affiliate provider of an xDSL offering directs its data traffic to its ISP affiliate. While it would be required to offer interconnection, the question is at what level it interconnects and what operability the connection would provide. In a likely scenario, the customer, among many other options, would want the option to telecommute or to work from home during non-office hours. This would require interconnection of the customer's service provider's network to that of the customer's employer's data services provider to reach the employer's LAN because most businesses are not willing to make their internal data networks accessible over the Internet. However, the rates for interconnection would not be regulated. Depending on the number of xDSL providers in the area and the charges for interconnection, some providers might not opt to have a separate direct connection to each other individual provider without the imposition of such a requirement.

This situation appears similar to the early years of telephony, when customers of competing telephone companies could only call each other. In fact, in the xDSL provider scenario, it is not clear that the provider's own customers would be able to intercommunicate. So what would constitute an **in**direct interconnection? Could the ISP's Internet connection be interpreted to meet the requirement? This would seem to be an economical alternative. Unfortunately, currently, such an interconnection would not assure privacy of communication or reliability of service. In addition to the interconnection requirements of section 251, the IURC and the Staff of the PSCW believe that the FCC must apply the requirements of the *Computer Inquiry* and *Open Network Architecture* proceedings to RBOC provision of information services in conjunction with its advanced services affiliate's services. Further, additional requirements will be necessary if the FCC intends to achieve a public utility network model as opposed to a private network model for certain RBOC advanced services offerings.

IX. Providing RBOCs the Authority to Offer Broadband Capability through an Affiliate Could Create New Monopoly Power

One of the most important goals set forth in the FCC's NPRM is the acceleration of the deployment of advanced telecommunications services.[27] Proposed rules which will allow an RBOC to offer these services through a non-regulated affiliate are meant to be an incentive for quicker and broader investment in new technology. Without an investigation into the scope of the deployment of broadband services such as xDSL (such as might occur with the FCC's 706 NOI), however, both the IURC and the Staff of the PSCW are unclear as to whether or not the RBOCs require an incentive in the form of deregulation to invest in their networks. The PSCW has previously acknowledged that in Wisconsin there is little LEC regulation to avoid through a data services affiliate under price cap regulation.

We believe that RBOC affiliates may have a competitive advantage in the provision of advanced services, which may already be deterring competitors from entering the market. RBOC advanced services affiliates may already have significant financial and technological assets at their disposal, so it may not be necessary for an RBOC to transfer a great deal of assets from its LEC to an affiliate. Therefore, allowing RBOCs to offer broadband services exclusively through an affiliate might actually strengthen the market power of the affiliate rather than promote competition.

If the FCC proceeds with the implementation of the NPRM, the IURC and Staff of the PSCW strongly recommend that the FCC undertake a rulemaking to adopt standards for when and how section 251(h)(2) of the Act could be applied to an advanced services affiliate. Section 251(h)(2) could serve as an important safeguard against many of our concerns, specifically:

- The provision of network elements that are essential to the provision of basic local exchange service, such as Signaling System 7, from an advanced services affiliate rather than an incumbent local exchange carrier;
- Disinvestment in the public switched telephone network that results because the RBOC invests heavily in the advanced services affiliate's packet switched network; and
- Failure to realize the ubiquitous deployment of advanced telecommunications services pursuant to the universal service goals contained in section 254 of the Act.

The affirmative application of section 251(h)(2) to an RBOC affiliate would appear to subject such an affiliate to the provisions of section 251(c) and section 252. In the NPRM, the FCC states that "...the FCC, under section 251(h)(2), may, by rule, treat as an incumbent a LEC (or a class or category of LECs) that occupies a similar position in the market for telephone exchange service within an area that is comparable to the position occupied by the incumbent LEC, and such carrier has substantially replaced an incumbent LEC."[28] We are not aware of any standards that the FCC has established for the application of section 251(h)(2), except that "a BOC affiliate is not 'comparable' to an incumbent LEC under section 251(h)(2) merely because it is engaged in local exchange activities."[29]

[27] NPRM page 4 at paragraph 1
[28] NPRM page 43 at paragraph 91
[29] Id.

If the FCC exempts data affiliates from sections 251(c) and 252 and ignores section 251(h)(2), the FCC will be putting the cart before the horse. Both the IURC and the Staff of the PSCW encourage the FCC, with substantial feedback from the states, to develop a concise yet comprehensive set of standards for when and how section 251(h)(2) should be applied. This rulemaking should take place prior to the implementation of the rules set forth in the FCC's NPRM regarding section 706. Establishing standards for the implementation of section 251(h)(2) not only will provide a safeguard against the concerns listed above, but also will provide appropriate regulatory factors to consider prior to deciding whether or not to undertake these types of internal corporate business arrangements in the first place.

X. NPRM Preempts State Authority to Regulate Intrastate Telecommunications Services

In its NPRM, the FCC states that the major obstacle to extensive deployment of high-speed data services is the local loop:

> If all Americans are to have meaningful access to these advanced services, however, there must be a solution to the problem of the "last mile." No matter how fast the network is, if the connection between the network and the end-user is slow, then the end-user cannot take advantage of the network's high-speed capabilities. For example, information generally moves very quickly across the high-speed backbone of the Internet. But its speed may be cut to a tiny fraction when it passes through the ordinary copper telephone line that runs into a residence. The end-user may not be able to receive data quickly enough to take advantage of broadband applications.[30]

The regulatory regime proposed by the FCC in the NPRM is geared at accelerating deployment of wireline, broadband services, notably xDSL, which relies on the incumbent LECs' investment in the copper loop.

The IURC and the Staff of the PSCW are concerned that the FCC has overstepped its authority in the NPRM because the FCC proposes rules that will effect how the cost of the existing copper loop is recovered. According to Part 36 of the Separations Rules, 75 percent of the recovery of the cost of the copper loop is the responsibility of state commissions.[31] States have both experience in establishing regulations that recover the majority of the cost for the "last mile" that is so critical to high-speed access to the Internet, and familiarity with the specific telecommunications demands of the customers whose intrastate services they regulate. The provisions of 47 U.S.C. 152(b) further reinforce this jurisdictional split.

It is important for the FCC to recognize that the IURC and the Staff of the PSCW view xDSL and other broadband technologies that rely on the existing copper loop as enhancements to the loop itself, not separate services. Therefore, the FCC's proposed rules allowing RBOCs to offer broadband capability such as xDSL through an affiliate could have serious implications on how the cost of the loop is recovered, and by extension, local rates. If loop recovery is not adequately addressed, we believe that the FCC and state commissions may be left with little choice but to raise the rates under their respective jurisdictions.

[30] NPRM page 6 at paragraph 8.
[31] 47 CFR 36.

Also, section 706(a) explicitly states that the FCC and each **state** commission shall encourage the deployment of advanced telecommunications services. States should have the authority to fulfill universal service goals based on the specific needs of their respective jurisdictions. The PSCW, for example, has enacted rules pursuant to its Telecommunications Act of 1993 (1993 Wis. Act 297) to assure statewide rollout of advanced service capabilities in a timely manner. Under that schedule, certain capabilities must be available statewide by a date certain at a reasonable price. LECs are responsible to meet this requirement wherever an alternative provider of the advanced service is not available. Upon complaint, or on its own motion, the PSCW may determine a reasonable rate for an advanced service and use state Universal Service Fund (USF) monies to subsidize its provision by a USF contributor if no provider will offer the service at that rate in that location. Without the ability to capture the benefits of the economies of scale and scope possible if Ameritech Wisconsin were the provider of service, the USF cost of supporting advanced service capabilities at affordable prices may become unsustainable—particularly without Federal Universal Service Fund contribution.

Pursuant to its state act, the PSCW codified the data transmission capability for voice grade lines at 9.6 kbps. in 1994. Customer demand is growing for data transfer speeds greater than the 9.6 kbps supports. While an estimated 70 percent of loops in Wisconsin can reliably support 28.8 kbps, the other 30 percent require a massive capital outlay for upgrading to meet that higher speed goal. An alternative that currently is being considered is to substitute a digital line for a voice grade line as the essential service since rollout of statewide availability of digital loops is already set for January 1, 2000. A real concern is whether and to what level the Federal Universal Service Fund will assist in funding the rollout of advanced service capabilities for high-cost areas in fulfillment of a state mandate, and for which there is a consistent requirement in the Telecommunications Act of 1996.

XI. Conclusion

In summary, the IURC and Staff of the PSCW have serious concerns about the rules contained in the FCC's NPRM. Specifically, we fear that if implemented, these rules will:

1) encourage non-competitive behavior on the part of the RBOC advanced services affiliate, thereby discouraging market entry by competitive carriers;
2) provide RBOCs with a disincentive to invest in the public switched network, leading to poorer service and higher rates for "plain old telephone service" subscribers;
3) stymie the universal service goals contained in section 254 of the act as they apply to advanced telecommunications, data transmission, and information services; and
4) effectively preempt state authority to recover the cost of the copper loop in certain circumstances under Part 36 of the FCC's rules.

The IURC and Staff of the PSCW encourage the FCC to proceed with its Notice of Inquiry regarding advanced telecommunications services; we believe that developing a clear understanding of the scope of the deployment of these types of services is a critical first step. We also strongly encourage the FCC to institute a rulemaking, with substantial input from the states, which will develop comprehensive standards for the implementation of section 251(h)(2) of the Act. Section 251(h)(2), if implemented, could prevent many of the possible negative policy outcomes that have been discussed in our comments. Finally, we request that the FCC undertake an investigation into the

corporate structure of RBOC LECs and advanced services affiliates to determine compliance with the structural separation requirements outlined in the NPRM.

INDIANA UTILITY REGULATORY COMMISSION

Submission of Comments to the Federal Communications Commission
September 24, 1998

IN RE: NOTICE OF PROPOSED RULEMAKING IN CONSOLIDATED DOCKET NOS. CC DOCKET NO. 98-147, CC DOCKET NO.98-11, CC DOCKET NO.98-26, CC DOCKET NO.98-32, CCB/CPD NO. 98-15 RM 9244, CC DOCKET NO.98-78, AND CC DOCKET NO.98-91.

The Indiana Utility Regulatory Commission submits the foregoing comments to the Federal Communications Commission (FCC) in response to the FCC's Notice of Proposed Rulemaking, Released August 7, 1998, under the previously cited consolidated dockets.

The Executive Secretary of the Indiana Utility Regulatory Commission is hereby directed to submit these comments to the FCC, in accordance with that Agency's procedural requirements.

ABSENT

Chairman William D. McCarty

G. Richard Klein, Commissioner

David E. Ziegner, Commissioner

Camie Swanson-Hull, Commissioner

Judith G. Ripley, Commissioner

ATTEST

Brian J. Cohee
Executive Secretary to the Commission

STAFF OF THE PUBLIC SERVICE COMMISSION OF WISCONSIN

Submission of Comments to the Federal Communications Commission

September 24, 1998

IN RE: NOTICE OF PROPOSED RULEMAKING IN CC DOCKET NO. 96-45 AND CCB/CPD NO. 98-15 RM 9244, CC DOCKET NO. 98-147, CC DOCKET NO 98-11, CC DOCKET NO. 98-26, CC DOCKET NO. 96-45, CC DOCKET NO. 98-78, AND CC DOCKET NO. 98-91

The Staff of the Public Service Commission of Wisconsin (PSCW) submits the foregoing comments to the Federal Communications Commission (FCC) in response to the FCC's Notice of Proposed Rulemaking, Released August 7, 1998, under the previously cited consolidated dockets.

This submission of staff comments is permitted by the undersigned Administrator of the Telecommunications Division of the Public Service Commission of Wisconsin under authority delegated by the PSCW in open meeting on September 24, 1998. The comments submitted are those of the staff of the Telecommunications Division of the PSCW. These comments do not constitute any form of opinion or decision of the PSCW on any of the matters raised in the comments or in the Notice of Proposed Rulemaking.

Respectfully submitted,

Scott Cullen, P.E.
Administrator
Telecommunications Division

Public Service Commission of Wisconsin
610 North Whitney Way
P.O. Box 7854
Madison, WI 53707-7854
Ph: (608) 266-5481
Fax: 608 266 3957

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